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No. 85-1651.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WNEV-TV, NEW ENGLAND TELEVISION CORP.,
PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1228, AFL-CIO,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondent in Opposition.

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Questions Presented

1. Does the Union's allegation that the Employer violated six clauses of the collective bargaining agreement state a dispute as to the "interpretation, application, or performance of this agreement," within the meaning of the arbitration clause.

2. A. Are the questions about the timeliness and the amendment of the grievance procedural matters properly referred to the arbitrator.

B. Is the Court foreclosed from considering procedural questions about the grievance because the Employer failed to cross-appeal from the District Court.

3. Does a past practice become part of the "law of the shop" such that a dispute over its termination is arbitrable.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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Brief of Respondent in Opposition.

Statement of the Case

This is an action by a Union to compel an employer to arbitrate a question of interpretation of a labor contract. The Union wants to arbitrate whether the Employer violated the contract by eliminating an employee lounge. The facts are cited as (R. ____) from the Record Appendix of documents which the parties jointly filed in the Court of Appeals.

The International Brotherhood of Electrical Workers, Local 1228, AFL-CIO, hereafter the Union, and WNEV-TV, New England Television Corporation, the Employer, are parties to a collective bargaining agreement effective from April 1, 1983 through July 1, 1986 (R. 11). The agreement provides for a grievance procedure to resolve:

> All complaints, disputes or questions as to the interpretation, application, or performance of this agreement.

The agreement also contains a no-strike clause which states that:

> ... there will be no work actions, strikes (whether general, sympathetic or otherwise), picketing, boycotting, or any other interference with the Employer's operations during the life of this agreement...

(R. 42).

Prior to April, 1984, the Employer provided the Union employees with a lounge on the company premises (R. 72). In early April, the Employer eliminated the lounge and the Union grieved (R. 65, 66, 72, 73). The grievance protested the "Elimination of Technician Lounge on 2nd Floor" and cited reliance upon "past practice" (R. 66). As the Union tried to process the grievance through the contractual procedures, the Employer took the position by letter of May 4, 1984 that:

> This is not a matter which is subject to the grievance and arbitration procedures.

(R. 73, 100).

The Union requested arbitration by letter of July 3, 1986 and amended the grievance to cite one contract article (R. 67, 73). When the Employer responded that "There is no provision in our collective bargaining agreement pertaining to the Technicians' lounge," (R. 74, 103), the Union cited six contract provisions which were violated by the elimination of the lounge (R. 69-70). The Employer made no objection to the Union's changes in the grievance (R. 108).

When the Employer still refused to arbitrate, the Union brought suit on September 21, 1984 to compel the Employer to arbitrate the issues of:

> Whether the elimination of the Technicians' lounge violates the collective bargaining agreement and what is the proper remedy?

(R. 6).

The District Court, Skinner J., dismissed the Complaint with the conclusion that "(t)he cited articles do not create a duty to maintain a technicians' lounge" (Pet. for Cert. A-15). The Union appealed to the First Circuit which reversed and remanded (Pet. for Cert. A-10). The Circuit held arbitrable the Union's claims about the violation of the six contract clauses, the violation of the past practice, and the propriety of the amendment of the grievance (Pet. for Cert. A-6, 8, 11). The Circuit denied rehearing en banc and the Employer petitioned for Certiorari.

Reasons for Denying the Writ

The First Circuit held the grievance arbitrable on two alternative grounds. First, the Court found arbitrable the alleged violation of six contract clauses along with any procedural questions about whether the grievance was properly amended to state such violations. Second, the Court found that the original grievance, which cited only "past practice," was itself arbitrable. The first ground turns on an examination of the unique facts of this case: the six substantive clauses and the aspects of the grievance procedure that may control the timeliness or amendment of a grievance. The first ground has no implications beyond this contract and is therefore not an issue worthy of Certiorari even if the Circuit were dead wrong in its analysis of the contract. Because the decision of the Circuit can stand on this first ground, it is inappropriate to grant Certiorari to review the second independent alternative ground. The second ground involves the arbitrability of a past practice, another question which turns on the phraseology of this contract and is therefore inappropriate for Certiorari. While the Employer will point to cases which are alleged to have held that violations of past practice are not arbitrable, some of those cases simply do not hold what the Employer claims they do, others have been distinguished,

narrowed, and confined to their own facts, and the lead case has been widely criticized and rejected. The Circuits themselves do not perceive any conflict. Finally, both the first and second grounds of the First Circuit's decision adhere strictly to the principles set forth by the Supreme Court.

I. The Determination of Arbitrability of the Dispute Over the Six Contract Clauses Is a Factual Matter Unique to this Case and Inappropriate for Certiorari.

The principles of arbitrability were clearly stated 25 years ago in the *Steelworkers Trilogy: Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed. 2d 1403 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed. 2d 1409 (1960); and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed. 2d 1424 (1960). The principles were recently reaffirmed and restated in *AT&T Technologies Inc. v. Communications Workers of America*, ____ U.S. ____, 106 S.Ct. 1415, 54 U.S.L.W. 4339 (1986). While the Petitioner filed an eight page supplemental brief ostensibly to deal with that case, *AT&T Technologies* does not change the prior law one iota. It merely brings into line a Circuit that tried to create an *exception* to the *Trilogy*.

The principles of arbitrability are that 1) arbitration is a matter of contract, 2) the court must determine arbitrability, 3) the court must avoid resolving the merits of grievances, allowing even frivolous claims to be arbitrated, and 4) there is a presumption of arbitrability that may be rebutted only by forceful evidence of a purpose to exclude from arbitration. 106 S.Ct. at 1418-1419.

These principles were expressly applied by the First Circuit and they are not disputed by the parties. The Employer simply disagrees with the application of these principles to the facts of this case. The Employer would ask the Supreme Court

to examine the grievance and the six contract clauses and to second-guess the First Circuit as to whether there is a real dispute about the interpretation of the contract. It is not the role of the Supreme Court to re-examine every such determination of arbitrability. These questions turn on the facts and contract clauses of each case; they have no implications for any other case.

II. The Dispute Over the Six Contract Clauses Is Arbitrable.

The Union argued that the abolition of the lounge violated a contract clause restricting the Employer to only "reasonable rules" (R. 70). It also argued that the continued existence of the lounge was implied by five other contract clauses which set forth meal periods, work breaks, and the rights to organize and represent employees (R. 69-70). The contention was that the lounge was an indispensable element in the exercise of the rights under these clauses.

The WNEV-IBEW contract contains a very broad arbitration clause which applies to disputes over the "interpretation application or performance of this agreement." The Union's claims appear to be such disputes. There is nothing in the contract declaring that these particular clauses are not arbitrable. The broad no-strike clause would appear to prohibit strikes over such disputes. Therefore, the disputes ought to be arbitrable under the principles of the *Trilogy*. Before it erroneously endeavored to decide the merits of the Union's grievance, even the District Court agreed that "plaintiff's analysis appears to create an issue sufficiently substantial to require submission to an arbitrator" (Pet. for Cert. A-15). The First Circuit unanimously reached the same conclusion.

The Employer's disagreement seems based on the contention that implied rights are not arbitrable. There is no such exception to the principles of the *Trilogy* for implied rights.

To the contrary, the *Trilogy* expressly sanctioned the arbitration of implied rights. In *Warrior & Gulf, supra,* the Supreme Court ordered arbitration of a grievance protesting the contracting out of bargaining unit work. The Union gave no citation of a clause expressly prohibiting contracting out; it claimed that other clauses like a no-lockout clause implied such a prohibition:

> . . . we charge that the Company is in violation of the contract by inducing a partial lockout, of a number of the employees who would otherwise be working were it not for this unfair practice.

Warrior & Gulf, 363 U.S. at 576.

Arbitrability of implied rights is an accepted application of the basic principles:

> Perhaps because of a desire to avoid thus passing upon the substance of the plaintiff's claim in a section 301 action, many courts have construed the standard arbitration clause to cover claims which, while perhaps not addressed explicitly in the labor contract, may be plausibly asserted by inference.

Gorman, Labor Law, (West Pub. Co. 1976) at p. 559

III. Questions About the Timeliness of the Grievance Are Procedural Matters for the Arbitrator.

The Employer complains that the Union's claim of violation of six contract clauses is untimely and therefore inarbitrable. The principles controlling the arbitrability of such procedural questions are longstanding and unambiguous. In the case of *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1964), the Court established that matters of procedural arbitrability were for the arbitrator to decide. Specifically, it held that the timeliness of a grievance was for the arbitrator. In *International Union of Operating Engineers v. Flair Builders, Inc.,* 406 U.S. 487 (1972) the Court held that a four year delay in

the processing of a grievance was a procedural question for the arbitrator. The First Circuit applied these legal principles.

In the presence of such clear statements of the law, it is surprising that the Employer challenges this aspect of the First Circuit's decision. Even if the First Circuit had misapplied the law to the facts and contract clauses of this case, this would not be a matter for Certiorari. The resolution of the issue would again have no implications beyond the instant contract. However, there was no misapplication of principles. The Circuit recognized that the Union could make a plausible argument that it could file a grievance within the 30 day period, that it had the right to amend the grievance after the 30 day period and that the amendment would relate back to the original grievance. Such arguments quite clearly raise the procedural questions which are appropriate for the arbitrator.

A final reason for which these procedural questions should not be dealt with by the Court is that the Employer failed to cross-appeal the disposition of the issue in the District Court. The questions of timeliness of the Union's claims were rejected or ignored by the District Court which went right to the merits of the Union's six contractual claims. While the general rule is that an appellee need not cross-appeal to pursue arguments which were raised but rejected by the District Court, the timeliness of a claim is an exception to the rule. The successful appellee must cross-appeal to pursue the timeliness issue. *Alaska Industrial Board v. Chugach Electrical Association, Inc.*, 356 U.S. 320, 324-325, 78 S.Ct. 735 (1957); *Tallman v. Udall*, 324 F.2d 411, 417 (C.A.D.C. 1963) rev'd on other grounds 380 U.S. 1, 85 S.Ct. 792 (1965); 9 Moore's Federal Practice, par. 204.11 (3) at 449 & 450; Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion*, 87 Harvard L. Rev. 763, 768 (1974).

IV. Past Practices Are Arbitrable: There Is No Uncertainty or Conflict Among the Circuits.

This Court has long ago determined that violations of past practice are arbitrable under the ordinary arbitration clause:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law — the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it.

Warrior & Gulf, supra, at 581-582.

The Circuits have widely applied that determination and supported the arbitration of past practice claims like the one at issue in this case. *H.K. Porter Co. v. United Saw File and Steel Products Workers of America*, 333 F.2d 596 (3rd Cir. 1964); *Norfolk Shipbuilding and Drydock Corp. v. Local No. 684*, 671 F.2d 797 (4th Cir. 1982); *Safeway Stores v. American Bakery & Confectionery Workers International Union, Local 111*, 390, F.2d 79 (5th Cir. 1968); *Bakery Salesmen v. I.T.T. Continental Baking Co.*, 692 F.2d 29 (6th Cir. 1982), *cert. denied* 462 U.S. 1119 (1983); *Local Union No. 702 v. Central Illinois Public Service Co.*, 324 F.2d 920 (7th Cir. 1963); *Edward Hines Lumber Co. v. Lumber and Sawmill Workers Local No. 2588*, 764 F.2d 631 (9th Cir. 1985); and *Loveless v. Eastern Airlines, Inc.*, 681 F.2d 1272 (11th Cir. 1982); *Cf. Rainbow Glass Co. v. Local Union No. 610*, 663 F.2d 814 (8th Cir. 1981); and *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. White Motor Co.*, 505 F.2d 1193 (8th Cir. 1974), *cert. denied* 421 U.S. 921 (1975). Any case to the contrary would be at odds with *Warrior & Gulf, supra*, and would outside the mainstream of the prevailing law in the circuits. Nevertheless, the Employer asserts a conflict in the circuits and directs the Court to decisions in the 2nd, 3rd, and 7th Circuits.

The decisions cited from the 7th Circuit are not in conflict with the First Circuit. In *Chicago Web Printing Pressmen's Union v. Chicago Newspaper Publishers' Association*, 772 F.2d 384 (7th Cir. 1985) the parties arbitrated the Union's claim that the company violated a longstanding practice. The arbitrator rejected the claim and the Union brought suit to set aside the arbitrator's award. The 7th Circuit upheld the award and concluded that the arbitrator had the right to determine that the practice was no longer enforceable. This case affirms the mainstream principles that past practices are arbitrable matters. It is surprising that the Employer would cite it for a contrary proposition. The other 7th Circuit case cited by the Employer was decided before the *Steelworkers Trilogy*, *Independent Petroleum Workers of America v. Standard Oil Company*, 275 F.2d 706 (7th Cir. 1960). The case expressly relied on pre-*Trilogy* law and has obviously now been overruled. The decision in *Local Union No. 702 v. Central Illinois Public Service Co.*, *supra*, indicates that the 7th Circuit now clearly recognizes the arbitrability of past practices. In that case, the Court ordered the Employer to arbitrate a dispute over the discontinuation of the practice of gas discounts for employees. There was no reference whatsoever to gas discounts in the contract. There was only the standard arbitration clause covering "any disagreement arising . . . under this agreement." *Id.* at 921.

The Third Circuit decision cited by the Employer is a cryptic half-page opinion holding that the termination of the practice of giving Christmas turkeys is not arbitrable. *Boeing Company v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 349 F.2d 412 (3rd Cir. 1965). The case cites no precedent and it seems to be based on the unique factual determination that "arbitration was limited to grievances involving a specific provision of this agreement." *Id.* at 413. The case seems inconsistent with the more thoroughly reasoned opinion in

H.K. Porter Co. v. United Saw, File and Steel Products Workers of America, supra, where the 3rd Circuit confirmed an arbitrator's award of pension benefits to employees who did not meet express contract eligibility requirements. The arbitrator based his decision solely on the past practice of granting such benefits. *Boeing* appears to be overruled by *Ludwig Honnold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1969).

One 2nd Circuit case cited by the Employer is a decision of a District Court which does not preclude the arbitrability of a past practice. *Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co.*, 195 F. Supp. 64 (E.D.N.Y. 1961), aff'd 298 F.2d 647 (2nd Cir. 1962). There the Union claimed a violation of past practices and sued to compel arbitration. The District Court denied the Union summary judgment but allowed the Union to demonstrate at trial that the practices were related to the current agreement. *Id.* at 67. That interlocutory decision was not appealed to the Circuit. 298 F.2d at 647. This case should have no significance in the determination of whether to grant Certiorari.

The main case which the Employer cited from the Second Circuit involved a more reasoned decision to vacate an arbitration award based upon a past practice. *Torrington Company v. Metal Products Workers*, 362 F.2d 677 (2nd Cir. 1966). It contains an even better reasoned dissent. *Id.* at 682. Perhaps because the case contains the only reasoned decision holding a past practice inarbitrable, it has become the lightening rod for criticism. *Holly Sugar Corp. v. Distillery, Rectifying Wine & Allied Workers, Int'l Union, AFL-CIO*, 412 F.2d 899, 905 (9th Cir. 1969); *Dallas Typographical Union No. 173 v. A.H. Belo*, 372 F.2d 577, 583 (5th Cir. 1967); *Cape Cod Gas Co. v. United Steelworkers of America*, 3 Mass. App. Ct. 258, 263 n. 4 (1975). Aaron, *Judicial Intervention in Labor Arbitration*, 20 Stan. L. Rev. 41, 48-51 (1967); Christensen, *Labor Arbitration and Judicial Oversight*, 19 Stan. L. Rev.

671, 690-693 (1967); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. Rev. 663, 802, n. 538 (1973); Jones, *The Name of the Game is Decision—Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration*, 46 Tex. L. Rev. 865, 869-874 (1968); Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. Chi. L. Rev. 545, 552-554 (1967); *Cf.* Nurse, *Custom and Practice in Labour Relations in the United States; A review of the Evidence*, January 1979 Labor Law Journal 38, 43-5 (1979); Gilman, *Past Practice in the Administration of Collective Bargaining Agreements in Arbitration*, IV Suffolk L. Rev. 689, 707-711 (1970).

The Second Circuit itself has now confined the effect of *Torrington*. In the case of *F. & M. Schaeffer Brewing Co. v. Local 49 International Union of Brewery Workers, etc.*, 420 F.2d 854 (2nd Cir. 1970) the 2nd Circuit limited *Torrington* to post arbitration review. It would not rely on *Torrington* to prevent an arbitration. *Id.* at 856. In a subsequent case, the 2nd Circuit appeared to limit *Torrington* to its unique facts involving a practice which "the company had terminated two years before the arbitrated dispute arose" and a negotiation at which the parties discussed reviving the defunct practice but failed to put anything in the contract. *Humble Oil & Refining Co. v. Local 866, International Brotherhood of Teamsters*, 447 F.2d 229, 233 (2nd Cir. 1971). The 2nd Circuit does not appear to have resurrected the aspects of *Torrington* which dealt with past practice. The more recent discussions in the other circuits no longer recognize a conflict over the arbitrability of past practice. The decisions of *Norfolk Shipbuilding and Drydock Corp. v. Local No. 684, supra, Bakery Salesmen v. I.T.T. Continental Baking Co., supra* and *Edward Hines Lumber Co. v. Lumber and Sawmill Workers Local No. 2588, supra*, no longer even discuss *Torrington*.

Conclusion

In addition to all the reasons already discussed, this case is particularly inappropriate for review by Certiorari because the First Circuit's order to arbitrate is *interlocutory*. If the case is allowed to go to arbitration, the arbitrator may dismiss the grievance or may grant it on only one of the many grounds urged by the Union. After arbitration, if the case is not mooted by a dismissal, the issues will be refined and review by the Court will be a simpler process. For all the foregoing reasons the Union asks that Certiorari be denied.

Respectfully submitted,

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